

KURT MICHEAL REITZ
versus
STANDARD CHARTERED BANK OF ZIMBABWE LIMITED
and
COGHLAN WELSH AND GUEST
(INCORPORATING STUMBLES AND ROWE)

HIGH OF ZIMBABWE
TSANGA J
HARARE, 22 & 28 September, 2016

Urgent application

T Zhuwarara with Mr *Rudolph*, for applicant
T Mpofu with *R Chawatama*, for 1st respondent
Z Makorie, for 2nd respondent

TSANGA J: The applicant, Kurt Reitz, is immigrating to America where he intends to set up business which he says is a key condition of his immigration status. He filed an urgent chamber application seeking to compel the first respondent, Standard Chartered Bank to transfer his funds to America, in the sum of US \$1 053 143.00. The funds are held in a trust account which the 2nd Respondent, Coghlan Welsh and Guest (CWG), a law firm, holds with the Bank. The money in question is from proceeds of shares in a company which the applicant is disinvesting from. While the purchasers of the shares are trustees of a local trust, the money, however, was from outside funds and was deposited into the Bank's Nostro account for crediting of CWG's account on behalf of applicant. Approval to remit the funds was received from the Reserve Bank of Zimbabwe (RBZ) on the 11th of August 2016. Mr Kurtz was advised accordingly on the 19th of August 2016. On the 26th of August 2016, CWG wrote to the Bank requesting that an amount of \$1 250 000.00 be remitted to the United States of America. They were advised that the RBZ would be approached for an allocation of funds in order to effect this transfer.

The applicant's position is that the funds should be available on demand from Standard Chartered Bank as they were free funds. He alleges that his right to movement and his right to property are accordingly being impacted upon by the failure by Standard Chartered Bank to honour his request for payment. Moreover, he says his investment based

visa is in jeopardy. He also states that he does not accept the position that the approval of the Reserve Bank of Zimbabwe (RBZ) for a special allocation for remittance of the monies is necessary, given that the funds were free funds.

Furthermore, he queries Standard Chartered Bank's classification of the funds under the RBZ's *Exchange Control Operation Guidelines and Compliance Framework to Authorised Dealers, (ECOGAD D8/16)*, as non-priority. Under these guidelines are three categories for foreign payments. Priority one, which is the highest, addresses payments for exports and imports and foreign investment, which includes capital disinvestments, profits and dividends.

Priority two is for bank borrowing clients in the productive sector while priority three, considered a low priority, covers items such as university fees and payments for those in the retail and wholesale service. The fourth category which is not a priority, covers payments for capital remittances from disposal of local property and capital remittances from cross border investments. The applicant classifies the funds he wants remitted as an emigration based disinvestment, which he says falls in the highest priority category for payment. Standard Chartered Bank, on the other hand, has classified the transaction as disposal of commercial property, which falls into the non-priority category.

Points in limine

Several points *in limine* were raised at the hearing on behalf of Standard Chartered Bank as the first respondent. On urgency, Mr *Mpofu* who appeared on the Bank's behalf, argued that the matter was not urgent since Mr Reitz had been advised as way back as the 19th of August that the Bank was not going to be making a once off payment. He therefore argued that as such urgency could not have arisen in September. In response, Mr *Zhuwarara* who appeared on Mr Reitz behalf, posited that in assessing urgency, it was necessary to look at the totality of the circumstances and the time bound nature of the application for emigration. He emphasised that Standard Chartered Bank is essentially violating the applicant's rights to property and movement as he will not be able to enjoy the rights accorded at law without being granted his money. In other words, that he needs the money to enjoy his right to emigrate. He pointed out that whilst indeed Mr Reitz had been informed as way back as August 19th that the payment would not be made in one tranche, he had given the process time and only when he could no longer entertain the delay, had he filed the application.

On this aspect of urgency, I am inclined to agree with Mr *Zhuwarara* that the circumstances of the case were such that it was reasonable to give the process time and that the applicant cannot per se be penalised for bringing his application at this point in time. I will therefore not harp unnecessarily on the issue of urgency on account of a perceived delay in the bringing the application. It is not the crux of the matter.

However, another aspect of urgency that was raised *in limine* was that the application is premature since the papers make it clear that the central bank, the RBZ has been approached on the request and therefore there is no need for applicant to have approached the court at this point. This particular aspect of urgency needs to be considered conjunctively with the other points *in limine* in this matter given that as with these other issues, they in fact essentially address the merits of the application as a whole.

A key assertion, also linked to the argument that the application was premature, was that the applicant's remedy lies against the RBZ because it is the latter which has the capacity to issue an order to Standard Chartered Bank to pay applicant as instructed by CWG. The application before me was said to be fatal on account of failure to join the RBZ, which could not be saved by r 87 of the High Court Rules, 1971 which deals with non-joinder or misjoinder of parties. Mr *Zhuwarara* maintained there had not been any material non joinder of an interested party as it is Standard Chartered Bank that stands in the way of applicant's right to emigrate. He held this view on account of RBZ having given its consent to the funds being transferred and that as such, it had already done the needful.

On this score, it is not in dispute as supported by the papers filed on record, that CWG, upon receipt of confirmation from Standard Chartered Bank that the RBZ had given its authority to remit the funds, contacted Standard Chartered on the 26th of August in relation to the payment of the net proceeds. Standard Chartered in turn immediately wrote to RBZ indicating that it had insufficient funds from its allocation to make the payment and requested the requisite funds from RBZ's allocation committee. It is not in dispute that RBZ responded on the 1st of September 2016 and indicated that the application had been referred to the Financial Markets Division for consideration. A response remains awaited. In light of these facts, I agree with Mr *Mpofu* that the Bank ought to have been joined in the matter. The delay has nothing to do with Standard Chartered Bank. At every turn, it has taken the necessary steps to action the request.

It was also argued that the relief sought is contrary to law because the court cannot order that which is contrary to law. See *Airfield Investment (Pvt) Ltd v Minister of Lands*

*Agriculture and Rural Resettlement*¹. In *casu* there are guidelines in place by the Reserve Bank which mandate prioritising. Mr *Mpofu* emphasised that unless the instrument which forms the basis on which RBZ has issued the guidelines to Banks is set aside in proceedings made to obtain that particular relief, what applicant seeks in this case cannot be granted by the law. Furthermore, the RBZ has to be a party. He therefore argued that on this score the application was again ill conceived and should be dismissed with costs.

It is not in dispute that in the face of foreign currency shortages guidelines have been issued by RBZ as the central bank outlining priority categories to be followed by banks in making such payments. It is the central bank that at all times avails money to banks to enable them to meet payments under various priority categories. This is regardless of the fact that the clients will have deposited such money into their accounts. To the extent that Standard Chartered Bank is merely operating within the confines of the laws of the central bank, I do not see how it can be faulted.

Mr *Zhuwarara*'s argument was that Standard Chartered bank had in fact mis-prioritised the funds in question as falling into the non-priority category when they in fact fall into the first category of payments as disinvestment funds. He also argued that Standard Chartered Bank having paid applicant the sum of \$360 000.00 before, had not shown that it needed secondary approval in that instance which it now seeks to claim. He further maintained that it is in fact Standard Chartered Bank that has taken the law into their own hands by saying that this is not a priority. As regards the guidelines Mr *Zhuwarara* further argued that policy is not law and that guidelines are certainly not a law of general application as envisaged by the Constitution. He stressed that the relief that the applicant seeks is constitutional in nature as the Bank's conduct is prejudicial in nature, resulting in failure by the applicant to exercise his rights.

Section 66 of the Constitution is explicit on the right to freedom of movement. The right to leave, is indeed a core component of freedom of movement. It is a right possessed by citizens and everyone else who is legally within Zimbabwe. Section 66 (2) which embodies this right, states that:

“(2) Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to—
(a) move freely within Zimbabwe;
(b) reside in any part of Zimbabwe; and
(c) *leave Zimbabwe.*”

¹ 2004 (1) ZLR at p 511

Being that as it may, I do not think that Mr Reitz's right to leave is being fettered in anyway by Standard Chartered Bank as he alleges. To the extent that he argues that the Bank is preventing him from enjoying his full freedom of movement through its failure to release his money, this is clearly not of Standard Chartered Bank's own making. It is the RBZ which has generated the guidelines under which Standard Chartered finds itself operating. The actual putting in place of the guidelines pursuant to a relevant statutory instrument is clearly outside effective judicial control. If the challenge is that the guidelines are unconstitutional then the constitutionality of the instrument which is the basis upon which the RBZ has put in place the priority guidelines can indeed only be challenged in proceedings brought to obtain that specific relief.

Another point raised *in limine* was that there is no cause of action as the client of Standard Chartered Bank is CWG and that applicant is a mere beneficiary of the relationship between the Standard Chartered and CWG. *Kircos v Standard Bank*.² In other words, the question is whether there is an absence of a contractual relationship that acts as a bar to the applicant bringing this application. What this court is being asked to decide on is the competency of an application directing the Bank to release funds, brought by a person who is not the direct customer of the bank, and who in essence, does not have a direct customer/client relationship.

Mr *Zhuwarara* challenged this assertion that there is no relationship between applicant and Standard Chartered on the basis that the latter's approach to the central bank is clearly on applicant's behalf. The nature of the relationship between a bank and its client is contractual in nature. Whilst I would agree that there is somewhat a substantial relationship arising from nature of the transaction in this case, the fact that the funds are being held in trust on behalf of a third party does not at all change the reality that ultimately a bank relates to the customer with whom it has a contractual relationship. It is the direct customer/bank relationship that enables an aggrieved party to bring a claim against a bank. I am therefore in agreement with Mr *Mpofu* that the applicant lacks *locus standi* in bringing this application directly against the Standard Chartered Bank and against CWG. The remedy clearly lies against RBZ in an application or action brought by CWG on applicant's behalf since it is RBZ which has the responsibility to issue funds to Standard Chartered in order for them to put into effect the instructions given to them by CWG on behalf of their client. As it stands, neither Standard Chartered Bank nor CWG have wronged applicant.

² 1988 (2) SA 58 (S R) at p 60

Accordingly, the application is dismissed with costs.

Devitte, Rudolph and Timba, applicant's legal practitioners
Mawere & Sibanda, 1st respondents legal practitioners
Coghlan Welsh and Guest, (Incorporating Stumbles and Rowe), for the 2nd respondent